FOIP FOLIO

PRIVACY AND SECURITY AWARENESS MONTH REFLECTIONS

Congratulations are due to **Duane Mombourquette** and his crew at the Access and Privacy Branch in Saskatchewan Justice and all Provincial Government FOIP Coordinators for an action packed September that has highlighted the importance of compliance with our access and privacy laws. This included an excellent program for three days in late September including the *Saskatchewan Access, Privacy, Security and Records Management Forum – Making Connections.* The conference presented an array of knowledgeable speakers from across Canada. Thanks to **Jennifer Stoddart**, (Privacy Commissioner of Canada), **Frank Work** (Alberta Information and Privacy Commissioner) and **Irene Hamilton** (Manitoba Ombudsman) for reminding us that the challenges we wrestle with in this province are very similar to challenges posed in other Canadian jurisdictions.

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LEADERSHIP FROM THE TOP

On September 1, 2010, **Premier Brad Wall** issued an important message to all Government of Saskatchewan employees. The Office of the Information and Privacy Commissioner (OIPC) encourages all public sector workers (including local government) to read the direction from the Premier. In that message he commented:

...

There are laws that protect information: The Freedom of Information and Protection of Privacy Act and The Health Information Protection Act. Together, they provide privacy rules and establish a right of access to records in government.

However, I am mindful of the fact that our real strength lies not in the laws themselves but in the people in government who work with this information each day to deliver our programs and services. Privacy is in our hands. Accountability is ours.

I applaud everyone who continues to work hard to ensure our compliance with these important laws and I would like to take this time to encourage everyone in government to continue efforts to ensure we protect the privacy of our citizens while supporting the legislated right of access to government records.

At the Regina conference discussed in an earlier article, **Privacy Commissioner Stoddart** endorsed this clear and positive message from our Premier. The entire message, titled "Privacy and Security Awareness Month"can be viewed at http://www.justice.gov.sk.ca/PSAM.

GOOD NEWS FOR SASKATCHEWAN BUSINESSES

The Privacy Commissioner of Canada has launched an enhanced on-line tool to help businesses protect their customers' privacy. The *Privacy for Small Business online tool* involves an on-line assessment which should take less than 30 minutes to complete.

At the end you will be able to print out the materials provided including:

- an information audit of your business,
- consent provisions specifically for your business, a security plan,
- a sample privacy brochure and
- a training needs assessment.

You can access this and other information at http://www.priv.gc.ca/. This tool reflects many of the needs identified in the 2009 *Privacy Made Easy* pilot project that was undertaken in this province by the federal Commissioner in partnership with the OIPC.

OIPC REPORT RE: SASKATOON DEVELOPMENT PROJECTS

The OIPC released its Review Report LA 2010-001 in October. The Commissioner upheld the decision of the City of Saskatoon to withhold certain records and portions of records from the applicant. The Commissioner upheld the City's reliance on the 'solicitor-client privilege' exemption, the 'advice from officials' exemption (in part) and the 'third party personal information' exemption. He recommended the release of the remaining records to the applicant. The records in question relate to building projects in the City of Saskatoon. Provisions in LA FOIP considered in the Report include sections16(1)(a), 16(1)(b), 16(1)(c), 16(1)(e), 21 and 23(1). The full Report is available at www.oipc.sk.ca under the *Reports* tab.

CANADA'S INFORMATION AND PRIVACY COMMISSIONERS ADOPT OPEN GOVERNMENT RESOLUTION

At the Annual Meeting of Canada's access and privacy oversight offices on September 1, 2010, the Saskatchewan **Commissioner Gary Dickson** joined with other Commissioners to endorse a resolution promoting 'open government'. Open government means public bodies making records and information available to the public proactively instead of simply responding to formal access requests. The full text of the Resolution and backgrounder is available at www.oipc.sk.ca under the *What's New* tab.

OUTSOURCING STORAGE OF MEDICAL PATIENT FILES

On March 10, 2010 our office published on our website the document *Advisory for Saskatchewan Physicians and Patients Regarding Out-Sourcing Storage of Patient Records*.

The advisory addressed certain materials that were being used in Saskatchewan by an Ontario based company, DOCUdavit Solutions Inc. (DSI). Subsequently, DSI significantly revised its *Privacy Policy* and its *Contract* for purposes of records relating to Saskatchewan patients and Saskatchewan based physicians. These revisions have been reviewed by our office and we are satisfied that those revisions reflect suggestions from our office to align with the provisions of *The Health Information Protection Act* (HIPA). We do not endorse any commercial vendors of information management services but given our earlier Advisory, it is appropriate to publicly acknowledge the changes that have been made by DSI to those two documents.

REDESIGNING IP GEOLOCATION

The Ontario Information and Privacy Commissioner office has turned its attention to online targeted advertising. In collaboration with the Ontario **Commissioner Ann Cavoukian**, Bering Media has developed an innovative technology to allow ISPs (Internet Service Providers) that partner with an ad server to provide IP (Internet Protocol) geolocation services with zero disclosure of identifiable information about subscribers. This would allow the ISP to partner with an ad server without the need for reading or modifying any packets travelling through the ISP's network. For more information about this initiative, see www.ipc.on.ca.

PRIVACY COMMISSIONER'S ANNUAL REPORT (RE: *PRIVACY ACT*) 2009—2010

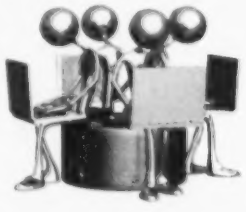
In her latest Annual Report to Parliament 2009 – 2010 dealing with the federal *Privacy Act*, **Privacy Commissioner Jennifer Stoddart** noted that in the last year her office moved to further clarify its position vis-a-vis the Internet publication of personal information in decisions of administrative tribunals.

She stated that: *"In compliance with our provincial and territorial counterparts, we developed guidelines aimed at helping tribunals fulfill their mandates and service the public interest, while remaining compliant with the [federal Privacy Act]."* Those guidelines are available at our website at www.oipc.sk.ca. Her Annual Report documents cases where more personal information was disclosed by the Public Service Staffing Tribunal and the RCMP through their websites than was necessary or appropriate.

The Report also discloses that a number of complaints came to her office's attention with respect to the Saskatchewan Penitentiary. This included the discovery in the prison trash of 25 interview authorization forms that contained the names and fingerprint identifier number of inmates. The Correctional Service of Canada undertook to remind staff of the need for diligence when creating, using and disposing of sensitive or protected information.

ACCESS TO INFORMATION VIA PERFORMANCE MANAGEMENT MECHANISMS

Professor Paul Thomas, the distinguished Duff Roblin Professor of Government at the University of Manitoba, has produced an impressive working paper for the World Bank – *Advancing Access to Information Principles through Performance Management Mechanisms: The Case of Canada*. The paper is a useful examination of factors such as organizational culture, public service motivation, leadership, trust, accountability, and performance management. Professor Thomas eloquently reminds us that big changes can be made in a jurisdiction's access and privacy regime even when the access law itself may be deficient. For more information go to www.worldbank.org.



SOLICITOR-CLIENT PRIVILEGE IN SASKATCHEWAN

There has been a number of interesting court decisions across Canada that have considered solicitor -client privilege in the context of access and privacy law. The Supreme Court of Canada, in the case of Blood Tribe [2008 2 S.C.R. 574, 2008 SCC44], found that the federal Privacy Commissioner did not have the power under PIPEDA to require the production of material with respect to which solicitor-client privilege is claimed. In FOIP and LA FOIP in Saskatchewan, there is the provision that *"Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review: (a) require to be produced and examine any record that is in the possession or under the control of a [government institution or local authority]"* (Section 54(1)(a) in FOIP and section 43(1)(a) in LA FOIP). There is no similar provision in PIPEDA. This issue has not been addressed by a Saskatchewan court considering the FOIP or LA FOIP provisions referenced above.

Our Court of Appeal did however find in Law Society of Saskatchewan v. Merchant [2008 SK CA 128 (leave to appeal denied [2008] S.C.C. No. 538)] that the Law Society of Saskatchewan had the power to demand the production of privileged records in the course of investigating a complaint against a member, notwithstanding the Supreme Court of Canada decision in Blood Tribe. Arguably the wording in section 63 of the *Legal Profession Act* is less clear and direct than the wording in the above quoted sections of FOIP and LA FOIP. The Court of Appeal noted that there were rules for the Law Society to protect the confidentiality of solicitor-client information that was disclosed to the society. Arguably the confidentiality and non-compellability provisions in Part VI of FOIP serve the same purpose.

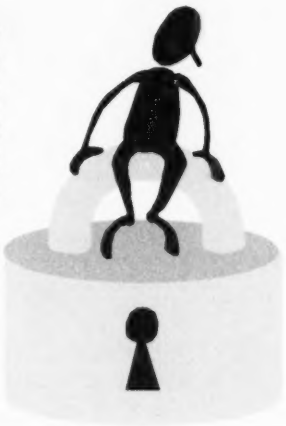
WHEN PRIVACY CONCERNS MAY BE TRUMPED BY PUBLIC INTEREST

We have been asked on several occasions to comment on the situation where a local authority has refused to release personal information by stating that LA FOIP does not allow them to release such information. While it is certainly true to say that normally personal information cannot be disclosed without the consent of the individual affected, the head of a local authority is required to consider the discretion afforded them by section 28(2)(n). That allows the head to release personal information without consent "for any purpose where, in the opinion of the head (I) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure."

It would be appropriate for the head of a local authority to publicly state that he or she has considered their discretion under section 28(2)(n) and decided not to release information. The key of course is communicating that the reason for the denial of the information is not that they are handcuffed by LA FOIP but that they have considered their discretionary power and chosen to exercise that discretion by denying the release of the information. In other words, the head must make a decision and take responsibility for that decision.

PRIVACY AND THE SMARTGRID IN ALBERTA

The Alberta Information and Privacy Commissioner, at the invitation of the Alberta Utilities Commission, has made a submission on the role of privacy and security in the SmartGrid now under development in that province. **Commissioner Frank Work** has cautioned the Commission that if the implementation of the SmartGrid proceeds, he will issue a formal finding on whether or not the information collected and the collecting organizations are subject to the *Personal Information Protection Act* (PIPA). Subscribers to the FOIP Folio will recall that the Ontario Information and Privacy Commissioner has published a document on the same issue (*Privacy by Design: Achieving the Gold Standard in Data Protection for the Smart Grid*) and is available at www.ipc.on.ca.



PRIVACY COMMISSIONER AUDIT OF PERSONAL INFORMATION DISPOSAL PRACTICES

There are good lessons to be mined from the federal Privacy Commissioner's recent audit report of disposal of personal information by Library and Archives Canada, Industry Canada (computers for schools) and Public Works and Government Services Canada (Crown assets distribution). The full Audit Report is available at www.priv.gc.ca.

The same federal Commissioner has also produced a further audit report on the protection of personal information in wireless environments. This included Canada Mortgage and Housing Corporation, Correctional Service of Canada, Health Canada, Human Resources and Skills Development Canada and Indian and Northern Affairs Canada. This entailed a review of policies, procedures and practices for managing smartphones, cell phones and wireless networks. Included was a review of controls in place to protect personal information in a wireless environment, including the use of passwords and encryption and restrictions on the use of PIN –to-PIN messaging. The Audit Report concludes with six specific recommendations for these federal government institutions. The full Report is available at www.priv.gc.ca.

GUIDE FOR LANDLORDS AND TENANTS

The British Columbia Information and Privacy **Commissioner Elizabeth Denham** and her office has produced a useful set of privacy guidelines to assist landlords and renters in understanding and apply that province's *Personal Information Protection Act*. Although Saskatchewan landlords are subject to a different law – the federal *Personal*

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Information Protection and Electronic Documents Act, many of the issues are common. This may be of assistance to landlords and tenants in Saskatchewan.

The *Privacy Guidelines for Landlords and Tenants* can be found at www.oipc.bc.ca.

MARK YOUR CALENDAR!

November 2 & 3, 2010: *PIPA Conference 2010 - Getting Through the Privacy Jungle – How to See the Forest...and the Trees*, Hotel Arts, Calgary, Alberta. For more information, visit: http://www.privacyconference.ca/

November 23, 2010: *CAPA Conference*, Ottawa Civic Centre, Ottawa, Ontario. For more information, visit http://www.capa.ca/pre-agenda%202010.pdf

Canadian Bar Association Privacy and Access Law Section meetings in Regina and Saskatoon. To register for any of the following section meetings call CBA at (306) 244-3898.

SASKATOON

December 13, 2010: *Privacy and Access Law Section North*, Saskatoon Club, Saskatoon at 12:00 noon. Topic and Speaker TBA

REGINA

November 8, 2010: *Privacy and Access Law Section South*, Hotel Saskatchewan, Regina at 12:00 noon. Topic: *FOIP and Administrative Tribunals;* Speaker TBA

December 13, 2010: *Privacy and Access Law Section South*, Hotel Saskatchewan, Regina at 12:00 noon. Topic and Speaker TBA

OFFICE OF THE SASKATCHEWAN INFORMATION AND PRIVACY COMMISSIONER

503 – 1801 Hamilton Street
Regina, Saskatchewan
S4P 4B4

Telephone: (306) 787-8350 / Toll Free: 1-877-748-2298 / Fax: (306) 798-1603
E-mail: webmaster@oipc.sk.ca Website: www.oipc.sk.ca

If you wish to subscribe to the Saskatchewan FOIP FOLIO, please send your e-mail address to webmaster@oipc.sk.ca.